

# EXHIBIT HH

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3

4 SUZANNA BOWLING, )  
Individually and on )  
5 behalf of all others )  
similarly situated, )

6 )  
Plaintiff, )

7 )  
vs. ) No.

8 ) 1:17-cv-03982-AJN  
JOHNSON & JOHNSON and )  
9 McNEIL NUTRITIONALS, LLC, )

10 )  
Defendants. )  
----- )

11  
12  
13 November 9, 2018

14 10:02 a.m.  
15

16 Deposition of DENISE N. MARTIN, held at  
17 the offices of Bursor & Fisher, P.A., 888  
18 Seventh Avenue, New York, New York, before  
19 Laurie A. Collins, a Registered Professional  
20 Reporter and Notary Public of the State of New  
21 York.  
22  
23  
24

25 Pages 1- 155

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have -- how courts have -- and kind of awkward --  
defined it is the difference between the price  
paid by a consumer and the price that would have  
been paid absent some alleged wrongdoing.

Q. So in the context of this case would you agree that the alleged wrongdoing is the placement of the no trans fat claim on the Benecol packaging?

A. Yes, that's my understanding.

Q. Was Benecol a premium priced product? 11:30:12

MS. CHANOINE: Objection, vague.

A. I'd have to say -- you'd have to give me a frame of reference for that question.

Compared to what?

Q. Do you know the names of any cholesterol-lowering spreads that competed with the Benecol spreads in the marketplace?

A. [REDACTED]

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11:31:11

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[REDACTED] .

Q. As part of your work in this case, did you do anything to attempt to calculate a price premium solely attributable to the no trans fat claim on the Benecol packaging? 11:31:47

A. I didn't do a fulsome estimation of that. I did review the estimate put forward by Mr. Weir and am of the opinion that it's completely inflated. All the evidence that I have reviewed indicates that it's inconsistent with a price premium of that magnitude and is consistent, honestly, with the price premium of potentially zero. 11:32:18

Q. Other than the calculation that Mr. Weir performed of the price premium solely attributed to the no trans fat claim, have you seen any other evidence of price premium calculations in this case concerning the no trans fat claim? 11:32:43

MS. CHANOINE: Objection, form. 11:33:08

A. I disagree with the foundation of that question, which is that Mr. Weir has put forward an estimate of the price premium associated with the challenged claims. He just hasn't.

It's -- the tool that Dr. Dennis is 11:33:27

1 using, conjoint survey, is the wrong tool.  
2 There's just no circumstance in which that on its  
3 own can give an estimate of a price premium. So I  
4 have not -- I can't say that I've seen any  
5 evidence of price premium from Mr. Weir. I 11:33:39  
6 haven't.

7 I have done my own analysis to  
8 understand the market for the Benecol products,  
9 both from the perspective of McNeil and consumers,  
10 and they indicate that trans fats were not a 11:33:54  
11 focus, not a point of differentiation, which,  
12 again, is not a number, but it tells me that this  
13 claim is -- I wouldn't expect it to be material.

14 And then I see -- I did an analysis of  
15 the price when the claim came off the label, and I 11:34:11  
16 find at most a modest reduction in price that I  
17 don't believe is linked to the removal of the  
18 claim from the label.

19 So, again, all these things together,  
20 while I haven't done a fulsome analysis of price 11:34:25  
21 premium here, says you can't rule out what  
22 Mr. Weir did and everything else points to, you  
23 know, a de minimis -- a de minimis price premium,  
24 if any.

25 Q. Okay. But you personally did not do a 11:34:39



1 price premium calculation in this case; right?

2 MS. CHANOINE: Objection, form.

3 A. I would give exactly the same answer  
4 that I just gave.

5 Q. Okay. 11:34:55

6 Is a calculation of the price drop for  
7 the Benecol spread products the same thing as a  
8 calculation for the price premium solely  
9 attributed to the no trans fat claim, if any?

10 MS. CHANOINE: Objection, form, 11:35:21  
11 incomplete hypothetical.

12 A. No, I believe additional work would  
13 need to be done to assess whether any of that  
14 observed change in price is attributable to the  
15 label change. And I'm really not using it for 11:35:39  
16 that -- well, I am using it for that purpose, but  
17 it's primarily to impeach Mr. Weir; right?

18 He has this real-world market data  
19 that's flatly inconsistent with the results that  
20 he's picking up and multiplying from Dr. Dennis. 11:35:55  
21 And he has no explanation for the difference;  
22 right? I have an explanation: He's got the wrong  
23 tool, you know, he's got a biased survey, his  
24 numbers are just -- are just inflated.

25 Q. What did you mean when you just used 11:36:18

1 the word "inconsistent" in the context that you  
2 used it? What does the word "inconsistent" mean  
3 when you used it?

4 A. Contradicted by.

5 Q. And specifically what about Mr. Weir's 11:36:31  
6 work is contradicted by the data that you  
7 reviewed? Is it just the amount of his price  
8 premium calculation that's contradicted,  
9 purportedly?

10 MS. CHANOINE: Objection, vague -- I'm 11:36:56  
11 sorry, form.

12 Go ahead.

13 A. Do you mean the amount versus -- versus  
14 what? I'm having a little trouble understanding  
15 the question. 11:37:07

16 Q. I'm just going to ask the court  
17 reporter to read it back --

18 A. Okay.

19 Q. -- so maybe hearing it again might help  
20 you. 11:37:16

21 (Record read.)

22 MS. CHANOINE: Same objection.

23 A. He didn't do a price premium  
24 calculation. He's lifting a number from  
25 Dr. Weir's survey that is at best a willingness to 11:37:49





[illegible]

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Q. Okay.

(Pause.)

Q. As part of your work here, did you do 11:42:25  
anything to determine whether the price of Benecol  
with the no trans fat claim on the label would  
have been higher than the price of Benecol without  
that claim being on the label, holding everything  
else equal? 11:42:43

MS. CHANOINE: Objection, form.

A. And I believe I testified earlier that  
I have not done sort of a fulsome analysis of  
that. I've done enough to know that Dr. --  
Mr. Weir's use of 20 percent from Dr. Dennis is 11:43:01  
speculative, unreliable, flawed, wrong, and that  
what evidence we do have suggests if anything it  
would be a small fraction of that and may be zero.

Q. So do you believe that there is  
evidence suggesting that there may be some 11:43:30

1 positive price premium solely attributable to the  
2 no trans fat claim?

3 MS. CHANOINE: Objection, form,  
4 misstates her testimony.

5 A. Again, I haven't done a fulsome 11:43:48  
6 analysis of that. On the basis of what I have  
7 done, I believe any price premium -- I would not  
8 be surprised to find that there's no -- if I did  
9 that fulsome analysis, to find there's no price  
10 premium attributable to the challenged label. 11:44:07

11 Q. Do you have any opinion whether the  
12 price of Benecol would have been higher with the  
13 no trans fat claim on the label compared to not  
14 having that claim on the label, holding everything  
15 else equal? 11:44:34

16 A. Again, I have not done a fulsome  
17 analysis of that, but my opinion on the basis of  
18 what I have done is that I would not be surprised  
19 if there was no -- the price would not have  
20 been -- the price was not higher with the 11:44:49  
21 challenged claim on the label than it would have  
22 been with the challenged claim had been removed.

23 Q. But based on the work that you've done  
24 in this case, you do not know that for sure one  
25 way or the other; right? 11:45:04

1 MS. CHANOINE: Objection, form,  
2 misstates her testimony.

3 A. I think it's fair that I have -- to say  
4 that I have not done a fulsome analysis of that,  
5 but it doesn't change my opinion that -- well, 11:45:11  
6 first, the 20 percent is ridiculous; second, that  
7 at most it would be some small fraction of that,  
8 and that the evidence that I've seen leads me to  
9 believe that it might well be zero.

10 Q. Why didn't you do a fulsome analysis to 11:45:32  
11 determine whether the price of Benecol with the no  
12 trans fat claim on the label would have been  
13 higher than the price of Benecol without that  
14 claim on the label? Why didn't you do that?

15 A. Because the short answer is I didn't 11:45:51  
16 need to do that to offer the opinions that I'm  
17 offering here. I didn't need to do that to let  
18 the court know that it cannot rely on the  
19 estimates that Mr. Weir is putting forward.

20 Q. Do you think you should have done that 11:46:06  
21 fulsome analysis in connection with your work in  
22 this case?

23 A. No, in the sense that I don't need to  
24 do that to render the opinions that I'm offering  
25 here. 11:46:17



1 measure of damages that has been put forward here.

2 Q. And would that refund be?

3 A. Again, if you could --

4 MS. CHANOINE: Objection, calls for a

5 legal conclusion.

02:29:05

6 A. From the perspective of economics, if  
7 the allegation -- or the measure of damage is  
8 based on some assertion that a consumer would not  
9 have bought, from the objective of economics --  
10 and that's, whatever, validated and found to be 02:29:28  
11 the case, they wouldn't have bought but for the  
12 challenged claims, from the perspective of  
13 economics -- and, again, this is not legal  
14 testimony -- would be the difference between the  
15 price paid and the value of that product that was 02:29:40  
16 received to -- by the consumer.

17 So they didn't get nothing. Presumably  
18 they got something even though they said they  
19 wouldn't have bought. So you would want to net  
20 out whatever they got. That would be an 02:29:54  
21 individualized review -- right? -- the fact that  
22 people -- consumers have different values for --  
23 different valuations for different products means  
24 that that review would need to be conducted at a  
25 person-by-person level. 02:30:11

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1 Q. Would you have been able to determine  
2 whether there was a price premium attributable to  
3 the no trans fat claim solely from the retail  
4 sales data you reviewed for the Benecol spreads in  
5 this case?

02:30:53

6 A. I'm sorry, can you be more specific  
7 about what you're asking, would I have been able  
8 to...

9 Q. Determine whether there was a price  
10 premium attributable to the no trans fat claim  
11 solely from looking at the retail sales data you  
12 reviewed for the Benecol spreads in this case.

02:31:09

13 A. Okay. So if I had been asked to do  
14 this more fulsome analysis that I referenced  
15 earlier in the deposition, which, again, I don't  
16 believe -- I don't -- I did not need to do the  
17 render the opinions I have offered here. But if I  
18 was asked to do that, I would need additional  
19 information other than just the retail sales data  
20 that has been provided here.

02:31:25

02:31:41

21 Q. I want to go down to paragraph 9 in  
22 your report. Do you have that?

23 A. Yes.

24 Q. Can you just read that to yourself, and  
25 let me know when you're ready to continue.

02:32:04

1 (Pause.)

2 A. Okay.

3 Q. Do you see there is a sentence that  
4 says on page 8: Those consumers who would have  
5 decided not to purchase absent the challenged 02:32:45  
6 claims may be harmed.

7 Do you see the beginning of that  
8 sentence?

9 A. Yes.

10 Q. And when you wrote that were you 02:32:59  
11 talking about monetary out-of-pocket harm?

12 A. Again, I believe from the perspective  
13 of economics that if a person is asserting they  
14 would not have bought absent the claims, the right  
15 economic measure -- not necessarily the legal 02:33:41  
16 measure; I don't know -- it would be the  
17 difference between the price they paid and the  
18 value of whatever they received. You can say the  
19 market value, but the value to them. So it's an  
20 individualized -- individualized amount. But I 02:33:52  
21 believe it could be assessed monetarily.

22 Q. Can you please turn to page 10 of your  
23 report. Do you have that?

24 A. Yes.

25 Q. So you are a managing director at NERA; 02:34:37

1 tracked that, not to my knowledge.

2 Q. Do you think it's good idea to put  
3 stuff like that on NERA's Web site?

4 A. I guess a good idea for what?

5 Personally I don't -- 02:46:01

6 Q. For anything. Do you think it has any  
7 merit to post?

8 MS. CHANOINE: Objection to form.

9 A. I would say I get asked about -- every  
10 time I've been asked about it, it's always been in 02:46:13  
11 a deposition by opposing counsel. So in that  
12 sense I have not found it particularly helpful.  
13 Again, I haven't studied any other effects.

14 Q. Do you have page 11 of your report? Do  
15 you still have that? 02:46:49

16 A. Yes.

17 Q. Do you see in paragraph 20 at the  
18 bottom there's subparagraph C? Do you see that?  
19 It says, Market prices are determined by the  
20 interaction of these demand and supply processes. 02:47:00

21 Do you see that?

22 A. Yes.

23 Q. You're talking about actual market  
24 prices there; right?

25 A. Yes. 02:47:08

1 Q. And if we turn the page, there's  
2 paragraph 21 at the top; right?

3 A. Yes.

4 Q. Paragraph 21 says, Because these  
5 accepted principles of microeconomics explain that 02:47:25  
6 market prices are determined by the interaction of  
7 the forces of supply and demand, both supply side  
8 and demand side forces must be incorporated into  
9 any attempt to estimate a market-based price  
10 premium. 02:47:43

11 Do you see that?

12 A. Yes.

13 Q. What do you mean by the word  
14 "incorporated" in that sentence?

15 A. Taken into account, factored in. 02:47:48

16 Q. Is it fair to say that Dr. Dennis  
17 factored in information about supply side  
18 considerations into his conjoint survey by using  
19 actual market prices for Benecol in the survey  
20 design? 02:48:10

21 A. No, not in the way that's necessary to  
22 have the results of that analysis be a price  
23 premium.

24 Q. What do you mean by that?

25 A. That conjoint survey is a tool that 02:48:37



1 asks consumers questions, and its results are  
2 entirely based on those consumer preferences. In  
3 fact, it's measuring those -- at best, if done  
4 well, it's measuring those consumer preferences.

5 It's not taking into account anything 02:49:00  
6 about how the supply side might have been  
7 different if the demand side were different. So  
8 it's not -- it's just not designed to estimate a  
9 price premium. It just isn't. That's not the  
10 right economic tool. 02:49:12

11 Q. But now you're talking about  
12 hypothetical scenarios that are not real; correct?

13 A. Mr. Weir's 20 percent is a hypothetical  
14 scenario that is not real. It bears no  
15 relationship to reality. It's flatly contradicted 02:49:26  
16 by actual market data.

17 Q. The market data that shows that the  
18 price went down and the quantity sold went down  
19 when the label was removed from the package, is  
20 that the market data you're talking about? 02:49:41

21 MS. CHANOINE: Objection, form,  
22 misstates her testimony.

23 A. I would say that that description of it  
24 is not consistent with or not how I would describe  
25 it. And, again, how I would describe it is the 02:49:54



1 price, you know, hardly moved. And to the extent  
2 it did move, we're not sure whether it actually  
3 moved or it was just some change in concentration  
4 of where that product was sold.

5 We're not sure if it did come down 02:50:09  
6 whether that change happened prior to the label  
7 change. And to the extent it did come down, we're  
8 not sure if that decline is the continuation of a  
9 decline we have seen before, and it sure looks  
10 like that. 02:50:28

11 So, no, I would say we have not seen  
12 evidence that the price has changed.

13 Q. And when you kept saying we're not sure  
14 and we don't see, what you really mean is you  
15 don't see and you're not sure because you didn't 02:50:39  
16 do anything to study that; correct?

17 MS. CHANOINE: Objection to form.

18 A. I completely disagree with that,  
19 respectfully. But, no, I did -- I did -- I did  
20 work to cite that, and I described the work in my 02:50:51  
21 report.

22 And the conclusion of that is that your  
23 expert's estimate is not plausible in this market  
24 and that I believe that if I were to do a fulsome  
25 analysis of how the price might have changed 02:51:12

1 absent the labeling, it would not surprise me to  
2 find it was unchanged.

3 Q. But in fact you may be surprised that  
4 it did change and you'd never know because you  
5 never did the work; right? 02:51:29

6 MS. CHANOINE: Objection, form,  
7 misstates her answer.

8 A. I did a lot of work here, and I  
9 certainly did enough work to reach the conclusions  
10 and offered the opinions that I'm offering here. 02:51:48

11 What's before the court is not my  
12 estimate of a price premium. What's before the  
13 court is Mr. Weir's estimate of 20.8 percent,  
14 which is not even in the realm of -- it's  
15 inconsistent with everything else that I looked at 02:52:05  
16 and inconsistent with economics, economic theory.  
17 There's just no chance that that's a reliable  
18 estimate of the -- any price premium here.

19 Q. But when you say it's inconsistent,  
20 what you mean is just that the amount of the price 02:52:22  
21 premium that Dr. Dennis and Mr. Weir found was  
22 just different than the price premium suggested by  
23 the sales data, the actual market data that you  
24 reviewed; right?

25 MS. CHANOINE: Objection, form, 02:52:43

1 misstates her prior testimony, and asked and  
2 answered.

3 A. I want to be really clear about this --

4 Q. Great.

5 A. -- because, no, this is not about a 02:52:56  
6 degree. This is not about an amount. This is  
7 about they are applying a wrong tool. This can't  
8 be fixed by fixing some implementation of the  
9 conjoint. The conjoint is just not the right  
10 tool. 02:53:09

11 And the way it's implemented here is  
12 bad, and the result is this estimate of purported  
13 price premium that is at best some willingness to  
14 pay of one consumer in the survey and at worst is  
15 a random number. It doesn't -- it doesn't bear 02:53:27  
16 any relationship to any price premium in this  
17 market, any price premium attributable to the  
18 label.

19 So it's not a question of degree.  
20 We're not saying he says 20, I say 3. I'm saying 02:53:42  
21 20 is based on bad science. You can't use that.

22 Q. Do you understand that some courts in  
23 fact have ruled that conjoint studies are actually  
24 reliable methodologies for this sort of analysis;  
25 right? You recognize that? 02:54:06



1 MS. CHANOINE: Objection, calls for a  
2 legal conclusion.

3 Q. Do you recognize some courts have come  
4 out that way?

5 A. I do -- I am aware that some courts 02:54:16  
6 have found that conjoint survey is an acceptable  
7 way to estimate class-wide damages, and I would  
8 like to help this court understand why that's not  
9 right.

10 Q. You just think that all those other 02:54:37  
11 courts are wrong; correct?

12 A. Again, I haven't studied each of the --  
13 each of the circumstances and the particular  
14 surveys put forward there, but, yes, generally  
15 I -- conjoint is not the right tool. I can't 02:54:57  
16 estimate a price premium.

17 So if courts are being confused into  
18 thinking that that's what it does, that's wrong.  
19 That's just not what the tool is about.

20 Q. You just think that all the judges 02:55:07  
21 ruled that way, they were just confused; right?

22 A. Confused, misled, I don't know. I  
23 just -- I just know that -- this is not even my  
24 opinion; right? This is what textbooks say about  
25 conjoint, what the software that Dr. Dennis is 02:55:28

1 using say about conjoint, what -- again, anyone  
2 who really is familiar with this tool will tell  
3 you that it's a demand side tool, and so it only  
4 takes into account one half of the equation. It's  
5 not taking into account what the supply side is. 02:55:47  
6 So it can't generate a price premium.

7 Q. But Dr. Dennis's conjoint was designed  
8 using actual retail market prices for the Benecol  
9 spreads which you've testified incorporate or take  
10 into account supply side factors, haven't you? 02:56:18

11 MS. CHANOINE: Objection, form,  
12 misstates her testimony.

13 A. No, I believe I testified that what  
14 Mr. -- or Dr. Dennis and Mr. Weir both label as  
15 taking into account the supply side is 02:56:34  
16 insufficient is -- to reach any determination  
17 about the price premium.

18 Q. At what level would it be sufficient,  
19 you know, for supply side factors to be taken into  
20 account? What's the level? 02:57:10

21 MS. CHANOINE: Objection to form.

22 A. Again, I don't want to pretend it's a  
23 degree thing here. The conjoint, not the right  
24 tool. So no matter what you do -- I think all he  
25 says he does is he put a benchmark price -- the 02:57:24



1 4.80 price is used as a benchmark in his -- in the  
2 simulation, and everything else that feeds into  
3 that simulation is the results from the consumers'  
4 responses.

5 And further I know that even that 02:57:47  
6 demand side simulation only works in a certain  
7 range of prices. I understand that it doesn't  
8 work if you get below \$4.10. So even as a demand  
9 side tool it's not telling us the full -- any kind  
10 of full story. 02:58:06

11 Q. Can you please turn to page 13 of your  
12 report? Do you have that?

13 A. I do.

14 Q. Okay.

15 Do you see the third sentence down 02:58:19  
16 where it says, The historical sales and prices of  
17 the products reflect the outcome of particular  
18 demand and supply decisions given the specific  
19 circumstances that existed at that time?

20 Do you see that? 02:58:40

21 A. Yes.

22 Q. And did you write that?

23 A. I did.

24 Q. Do you still agree that historical  
25 sales and prices of Benecol reflect the outcome of 02:58:53

1 demand and supply decisions given circumstances  
2 that existed in the actual market?

3 MS. CHANOINE: Objection to the extent  
4 it doesn't actually reflect the wording of the  
5 document. 02:59:27

6 A. Yeah, you left out -- you left out a  
7 couple of words. But I am still of the opinion  
8 that historical sales and prices of products  
9 reflect the outcome of a particular demand -- of  
10 particular demand and supply decisions given the 02:59:42  
11 specific circumstances that existed at that time.

12 Q. And when I'm talking about  
13 circumstances and points in time, you're talking  
14 about circumstances and points in time in the  
15 actual marketplace, in the real world; right? 02:59:58

16 A. Yes. And I guess --

17 Q. Not a hypothetical world; right?

18 A. What Mr. -- Dr. Dennis and Mr. Weir are  
19 doing is a hypothetical world; right? They are  
20 saying what if consumer demand or consumer 03:00:17  
21 willingness to pay were to be reduced by 20  
22 percent.

23 Again, I don't think that's a realistic  
24 number for all sorts of reason. But that's a  
25 hypothetical. What would hypothetically happen to 03:00:33

1 supply, you have to model that to understand what  
2 would happen to price, and they're just moving  
3 that whole half of the equation.

4 Q. Okay. We'll see.

5 Can you please turn to page 16 in your 03:01:11  
6 report. Do you have that?

7 A. Yes.

8 Q. Do you see at the bottom there's  
9 paragraph 31 that begins on page 16? Do you see  
10 that? 03:01:27

11 A. Yes.

12 Q. And it says, It is not the case, as  
13 Mr. Weir asserts, that such supply side modeling  
14 would allow defendants to avoid liability.

15 And it goes on to say, If the price of 03:01:39  
16 the products with the challenged claims was  
17 actually higher than it otherwise would have been,  
18 economic models exist that could take into account  
19 both demand side and supply side changes and allow  
20 estimation of the "but for" price. 03:01:58

21 Do you see that?

22 A. Yes.

23 Q. And then it says, Any price premium  
24 that resulted from this exercise could then be  
25 awarded to all consumers during the alleged class 03:02:07

1 period.

2 Do you see that?

3 A. Yes.

4 Q. So the economic models that you're  
5 talking about in paragraph 31 could be used, in 03:02:20  
6 your opinion, to calculate damages on a class-wide  
7 basis in this case; right?

8 Why are you looking at Ms. Chanoine?

9 A. I thought she was going to object. I  
10 wanted to wait. 03:02:40

11 Yeah, in theory there is a class of  
12 general equilibrium economic models that allow the  
13 re-estimation of both the demand curve and supply  
14 curve and so could, again, in theory -- I haven't  
15 tried to do that here -- estimate the "but for" 03:03:01  
16 price. They require a significant amount of data  
17 and time and...

18 Q. And do you agree that the results of  
19 Dr. Dennis's conjoint survey could be used to then  
20 award all consumers in the putative class their 03:03:29  
21 refunds on a class-wide basis if liability is  
22 determined here?

23 MS. CHANOINE: Objection, form, calls  
24 for legal speculation, and misstates her  
25 testimony. 03:03:47



C E R T I F I C A T E

STATE OF NEW YORK )

: ss.

COUNTY OF NEW YORK )

I, LAURIE A. COLLINS, a Registered  
Professional Reporter and Notary Public  
within and for the State of New York, do  
hereby certify:

That DENISE N. MARTIN, the witness  
whose deposition is hereinbefore set forth,  
was duly sworn by me and that such  
deposition is a true record of the  
testimony given by the witness.

I further certify that I am not  
related to any of the parties to this  
action by blood or marriage and that I am  
in no way interested in the outcome of this  
matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 12th day of November 2018.



LAURIE A. COLLINS, RPR